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REPORT

OF

HON. C. A. FRAZER

ON THE

PENAL CODE.

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REPORT.

To the Honorable
the Legislature of the State of Texas:

In obedience to ARTICLE VII. of the Penal Code, the following Report is respectfully submitted by the undersigned, one of the Judges of the District Courts.

The design of the Penal Code is declared in it to be, "to define in plain language every offence against the laws of this state, and affix to each offence its proper punishment." The first branch of this design seems to be a mere enterprise of words—a war upon the vocabulary of the common law. Undoubtedly the law should be plain, not only in respect to the language and style in which it is written, but also in the harmony of its rules and principles. There should be no conflict between them. Whether the Code in these particulars, is superior to the system of laws which it has totally superseded, is a question which the Bench and Bar will decide. To justify the Code on the ground of an existing necessity to define in plain language, every offence against the laws of the State, assumes that there was an obscurity in the language of the previous laws, which ought to be removed. But was such the fact? It is not true, for judicial interpretation and construction had already imparted a fixed and definite meaning to every word, line, and page of the law, which was well understood by all who would read and understand, though its language and style had been as simple and plain as the alphabet. Men who are in fact lawyers, or have the capacity to be, have had no cause of complaint against the law in this respect. It is only

the managers, who would make the world believe that a knowledge of the law was withheld from the people by the artifice of lawyers, that examples of its style or vocabulary. You may abridge the law until it is condensed into axioms, and still it will be two voluminous for any but those who adopt its study and practice as a profession, to have anything like a general knowledge of it. Again, to justify the Code, it must be assumed, that the system abolished, was so imperfect as to demand a general change, and so totally defective, that the ends of justice could be more easily attained by abrogating the whole body of criminal law, both common and statutory, and constructing an entirely new system of material, collected from its ruins, than by well directed amendment. Such was not the fact. That portion of our former criminal jurisprudence, found on the pages of the common law, is clear and well settled. Its principles and rules are collected and expounded by a few standard authors, with such perspicuity and power of logic as to relieve them from doubt and conflict. That portion found in the statutes, was susceptible of all proper changes, without laying the ruthless hand of destruction upon the vast stores of just principles and enlightened and well adapted rules of decision and practice, which form the great body of our criminal law, and were the production not of one man or age, but of many men and ages, distinguished for genius, attainments, and talents; not as some would suppose, engaged in propounding sophisms, and announcing errors, but faithfully exercising their minds and hearts for the discovery of truth; and well has it been said that the offspring of the fallen is the perfection of reason. These principles and rules have been tested by almost every court in both hemispheres, and the law, guided the faithful attorney, with unerring certainty, to his client's cause, and Judges, through the most protracted and fatal trials, to the ends of Justice. The Bench and Bar are now bid adieu to them. They, together with much of the philosophy and vivid illustration, are swept away by the Penal Code, and made to give place to its arbitrary enactments.

which are yet to be expounded, harmonized and applied. At what delay of justice and expenditure of labor, time, and learning, on the part of the Bar and Bench, none can foresee.

An examination of the provisions relating to the whole Code, will sustain all that has been said about it in respect to the common law. It is there enacted, that, "in order that the system of Penal law in force in this State, may be complete within itself, and that no system of foreign laws, written or unwritten may be appealed to, it is declared that no person shall be punished for any act or omission, as a Penal offence, unless the same is expressly defined, and the penalty affixed by the written law of this State. This enactment and the repealing clause of the Code determined the fact, that it contains the entire written law of the State on the subject of crimes and punishments. Then, whatever is made Penal by it, is a crime, and as a consequence, nothing else is. All other laws are repealed, and in the absence of law, there can be no crime. It is evident, then, that the whole list of common law offences is blotted out, and that that law no longer informs us what treasons, felonies, and misdemeanors are. If either should be committed, we are not permitted to resort again to the lights of the common law to determine the ingredients of the offence, or to decide the degree of aggravation or extenuation which the circumstances of its commission attached to it, but we must confine the investigation to the narrow and cheerless path marked out by the Code. Truly, before us is immeasurably spread an ocean of darkness, while behind us is the full blaze of noon day light. Let it not be said that this is a mistaken view of the provision quoted, and reference be had to the following enactment to prove the mistake. "When the definition of an offence is *merely* defective, the rules of the common law shall apply and be resorted to for the purpose of aiding in the interpretation of such Penal enactment." It cannot be insisted that this provision was intended to authorize a resort to the rules of judicial construction or interpretation, as found in the book of the common law, to determine the import of

words, or the meaning of sentences employed by the Code in the definition of an offence; for it expressly provides that "this Code and every other law upon the subject of crime, which may be enacted, shall be construed according to the plain import of the language in which it is written. The evident object of this provision, was to relieve the enactments of the Code from the tests of judicial constructions, and subject them to the uncertain, and unauthoritative rules of interpretation of language afforded by mere scholastic learning. These ought to be observed, but not to the entire exclusion of all other means of arriving at the true import of a law and the intention of its makers; for this would deprive the law of its spirit, obscure the light furnished by the policy which protected its enactment, and render it harsh and oppressive. It must have been the design of this provision of the Code to place all existing rules of judicial construction and interpretation upon the meagre footing of a mere dictionary, stripping them of all authority and sanction which do not belong to simple scholarship. But shall it be said that the object of this provision was to authorize a resort to the common law to aid the Code in making out an offence? This will not do, for such a construction would completely annul and destroy the meaning of the first enactment quoted, which provides that "no person shall be punished for any act or omission as a Penal offence, unless the same is expressly defined, and the penalty annexed by the written law of this State." It is plain that the offence must, in all substantial particulars, be complete, according to the words of the Code: or no crime has been committed, whatever the act or omission complained of may have been. This view is clearly correct from another enactment, which is this, "Whenever it appears that a provision of this Penal law is so indefinitely framed, or of such doubtful construction that it cannot be understood, either from the language in which it is expressed, or from some other written law of the State, such Penal law shall be regarded as wholly inoperative." According to these enactments, the written law

must make out the offence, without the aid of the common law, and the only remaining office allowed it is that of a common dictionary.

The Code provides that "no person shall be convicted of any offence before he was of the age of nine years." The common law rule is, that all persons under the age of seven years, shall be conclusively presumed incapable to commit a crime. This presumption by the Code is extended to the age of nine years. There are but few attentive observers of the developement of a sense of right and wrong in minors who will not condemn the rule of the Code, and approve that of the common law. The consideration of this subject is not unimportant, for upon it, as on all others, a general rule must be adopted; such being the fact, the question is as to the age at which minors may have a sufficient knowledge of the moral quality of their actions to make them responsible for their acts. Will any man, however limited his experience or observation may be, assume that in this enlightened country of Bibles, Sabbath Schools, Churches, and other means of instruction, the majority of youths do not know at seven years of age, that it is wrong to steal, swear falsely, commit murder, or any other offence which is wrong in itself? Such a proposition is not sustained by truth, and it involves a concession against the moral condition of the country, which I will not make. If they, at seven years of age, have a knowledge of right and wrong, why should they not be held amenable to the law, and responsible for its violation? Let it be remembered that the character and extent of the penalty, and the mode of its infliction, is altogether a different question, and has nothing whatever to do with the general rule under consideration. The question before us now, is, whether a minor shall, under any circumstances, be punished by law for any act which he may commit at seven years of age, and not the mode or nature of the punishment. If a minor seven years of age, should be ignorant of the moral quality of his actions, he is amply protected by the rule of the common law,

which requires the prosecution in the case of minors under fourteen, to show by proof, sufficient knowledge to understand the moral qualities of their actions. Without this knowledge, the criminal intention necessary, with a few exceptions, to the commission of any offence of the class before specified, cannot exist. Knowledge must precede intention. The law should fix the period of possible guilt at seven, and not nine years. At that age, minors may know what is right and what is wrong.

The Code contains the extraordinary provision that "a married woman who commits an offence by the command or pursuasion of her husband, * * * * may be imprisoned for life, or a term of years, according to the nature and degree of the crime," &c., * * * * * At the common law, when a woman did an unlawful act under such influence, she was regarded as the innocent instrument of the husband, and he was made to suffer the penalty of the law. This rule has received the sanction of time, and the approval of enlightened experience, butit is no longer the law. Woman, possessed as we know her to be, of a yielding, trusting nature, and of a mind which, from its constitutional organization, makes her husband's will the guide of her actions, is made subject to prosecution and punishment for an act done by his command or persuasion. The penalty of every offence should be inflicted on the person who caused it to be committed, rather than on the instrument employed. The wife acting in obedience to the command or pursuasion of the husband, can only be regarded as a mere instrument. This enactment is applicable only to cases in which his will overcomes hers, and prompts the commission of the offence. Upon what principle then, ought she to be punished? The relation of husband and wife inspires so much confidence, and affords so many opportunities for one to influence the mind and feelings of the other, that it is natural that the one possessed of the stronger will should have power to frame the mind of the other to execute his designs. Especially when that mind is influenced alter-

nately by command and persuasion—by authority and affection. To her praise, be it said, that woman can be a martyr to her principles, even when the attempt is made by a husband to drive her from them; but when by such force her sense of right is overcome, and she is constrained to do an unlawful act, his heart is the seat of guilty intention, and her hand the mere agent of that intention. He is the felon, and she the dupe of his depraved nature. There can be no doubt that the well directed command or persuasion of the husband, has as much power to control the actions of his wife as the threats of one man of great personal injury to another would have to control his actions. In the latter case, the actor is not liable to punishment, because his act was not prompted by his own will, and for this, he is excused In the former case, the woman's act was not prompted by her will, and for this she ought to be excused. In both instances, the one who constrained the act to be done, should suffer the penalty affixed to it.

The law on the subject under consideration, should rest on this principle—if the wife should commit an unlawful act under the influence of the husband's will, enforced upon her by his command or persuasion, he should be regarded as the offender and made to suffer the penalty of the offence; but if her own will prompted the commission of the act, she ought to be convicted and punished for the crime In this view of the subject, it should be left to the jury as a question of fact for them to decide, whether the offence charged, was voluntarily committed by the wife, or by the command or persuasion of the husband; and convict, or acquit her according to the decision of the question; but in either event, the Code subjects her to the penalty affixed to the offence.

It is enacted that "no act done in a state of insanity can be punished as an offence." This, as a general rule, is not only humane but it announces a principle of every system of criminal jurisprudence known to civilized nations. There is, however, an exception not recognized by the Code, which should have been made. The exception is this, (and it exists in the

common law) insanity which results from drunkenness, and continues only during the existing fit of intoxication, however controlling and protracted it may be, should not determine the abstract question of guilt or innocence in a prosecution for an offence committed while insane from this cause. The unfortunate victim of such a habit, should perhaps be allowed to show his drunkenness in mitigation, but not to reduce the grade of the offence. Among the many reasons which might be urged to support the position, a sufficient one is this, that that state of mind which leads to the commission of the offence, is the wicked and unjustifiable act of the offender. No man has the right to prepare his mind by drunkenness for crime, any more than by madness, or training his heart to special or universal malice. The man who, from voluntary intoxication, becomes insane, knowing that such will be the result, commits, besides the destructive effects upon himself, the outrage upon society of him who turns loose in our midst the untamed lion or tiger, or discharges a loaded gun in a public assemblage. Neither knows, or anticipates the result, or cares for the consequences.

Again it is provided that, "when it shall appear that a minor was aided, or instigated in the commission of an offence, by a relation in the ascending line, or by his guardian, or an apprentice under age, by his master, or a wife by her husband, or a slave by a white person, such relation, guardian, master, husband, or white person, shall, at the discretion of the jury, in capital cases, be punished by death." The objection to this enactment is the discretion extended to the jury. Undoubtedly in such cases, the aider or instigator ought to be regarded as a principal offender and punished accordingly. Such was our former law, and its modification is an abandonment of well founded prineiple. Who, after justifying the penalty of death, in a case of murder, will say that the relation who aids or instigates a minor—the guardian who aids or instigates his ward—the master who aids or instigates his slave—the master who aids or instigates his apprentice, and the husband who aids or instigates his wife to commit murder, should not

suffer death without any discretion being left to the jury as to the penalty to be inflicted? It must be evident, that in all such cases, the design or intention that the offence should be committed, would have its origin in the mind of the person aiding or instigating it, and in a great majority of the instances where it did not, he would have the power to prevent it. The safer rule is to make death, in such cases, the absolute penalty, leaving the jury no discretion.

ARTICLE 64, PART II., TITLE II., provides that "when the penalty affixed to the commission of any offence is deprivation of political rights, such rights are intended to include the right of holding office, of serving on juries, and of suffrage, and it is discretionary with the jury, whenever such punishment is annexed to an offence, to deprive the defendant of one, or both of these rights, or to suspend the exercise of one or both for a limited time." Let us pause here and consider the effect of this provision. In cases of felony, regardless of the magnitude of the offence, if its penalty is not death, it is discretionary with the jury to decide whether the convict, after serving his time in the penitentiary, may hold office, vote or serve on juries. Where is the citizen whose heart contains one ounce of respect for the country, or its moral condition, that would tolerate a jury of felons or be willing to see the ballot box, or any office of the State opened to them? Strange it would be for a man, who on account of great crime, would be disqualified to vote and yet permitted to hold any office in the State, or from the same cause debarred from either, and yet allowed to sit as a juror to hear and decide causes of the first magnitude to the State and the citizen, or to pass upon the guilt or innocence of a man charged with the offence, for which he himself had been incarcerated in the penitentiary. Every just mind recoils from the proposition as soon as it is submitted; but such may be the result of the enactment under consideration. For the jury empannelled to try a case of felony, may say in a verdict of guilty, that the defendant, after his term of imprisonment expires, may be allowed to vote, hold office,

or serve as a juror, or the jury may preserve to him all of these rights, or suspend all or any one of them for a given time.—Shall it be said that the penitentiary is a suitable place to indoctrinate a man in the duties of a voter, an officer, or a juror and if not, why this enactment of the Code? The law authorizing a particular act to be done, necessarily assumes that circumstances may so combine, as to render the authorized act proper, and thus the law encourages the act to be done. In other words the law authorizing juries to preserve the political rights of felons, is a declaration that felons may and ought sometimes to be permitted to compose the juries of the country, fill offices and aid in the election of the officers of the State.

This provision is wrong, moreover, because it makes the equality of the administration of the criminal law depend on the caprice of juries. For instance, two persons may commit the same offence, under the same circumstances. One of them may be put upon his trial to-day and convicted, and made to forfeit all of his political rights; to-morrow, the other may be put on trial and convicted, but by the verdict protected in all of his political rights. Surely the law under which such inequality of punishment could take place, must be wrong. Let juries have power to decide the question of guilt or innocence, and the law affix the penalty, and then public justice can be equally administered. The acknowledged integrity, and known impartiality of jurors, cannot be relied on for an equal enforcement of the law, for the opinion of different individuals, formed upon the same state of facts, are often as different as the circumstances that influenced the formation of their character as is shown by the diversity of views among the people about law, religion, and government. I do not say that circumstances of mitigation or of aggravation may not surround a felony as well as offences of any description, but this I do assert that when it is ascertained that a felony of a particular kind has been committed, as that of perjury or larceny, it should be in every instance punished with the same penalty; leaving

the jury to determine its extent within the limits fixed by law; and I insist that the forfeiture of political rights should follow final conviction as an absolute and unconditional legal result. It will not do to object to the proposition here announced, on the ground that the felon may hereafter reform, and thereby restore himself to the dignity and just sentiments of the good and unoffending citizen, and make himself worthy of a participation in the affairs of the State. If reformation be possible, which I admit, it will be impossible for the jury at the time of the trial, to foresee when, and to what extent it will occur; and consequently the jury cannot tell when, if ever, he should be allowed to exercise his political rights. If the felon should ever reform and become again a good citizen, it will be in the power of the Legislature to restore to him, the full enjoyments of his political rights, which, if proper, would doubtless be done on a petition for that purpose, signed by a sufficient number of upright citizens to attest beyond doubt his reformation, and return to the principles and sentiments of a good citizen. This is surely the better rule and the jury should have no power over the subject.

Article 77, page 15, provides that, "where it appears by proof on the trial of a cause that the offender was, at the time of the commission of the offence, not over the age of seventeen years, he shall be sent to the House of Correction in all cases where a person over that age would be liable to imprisonment in the penitentiary for the same offence." The principle involved in this enactment, cannot be harmonized with the principle which lies at the foundation of a provision before noticed, which provides that no person shall be punished for an act as an offence, committed before he was nine years of age, nor before he was thirteen, unless it shall appear by proof that he had discretion sufficient to "understand the nature and illegality of the act." This enactment assumes, that all persons at, and over thirteen years of age, have discretion sufficient to understand the nature and illegality of an act prohibited by law. It will not be denied, that this knowledge is the true test of

guilt—that is, that an understanding of the nature and illegality of an act, is the test of criminalty for the commission of the act. Then the question arises, why should a distinction be made as to the penalty of a given offence between persons who have a knowledge of its nature and illegality? The great objection to the principle is, that persons of equal guilt may necessarily, by force of positive law, be unequally punished. Good government as well as common justice, demands, that where there is an equality of offence, there should be an equality of penalty. If this rule should be abandoned, what other resort will be had, to regulate the administration of the criminal law? Will you adopt relative position in society, in fortune, religion, or government, as the standard? All in a moment will see that either would be most reprehensible, and inconsistent with every principle that lies at the foundation of our society and government. Neither will do. The whole subject must rest on the abstract question of guilt, which cannot in morals, or well regulated law, exist in the absence of sufficient discretion to understand the nature and illegality of the offence. It will be seen that the question of the age at which a person should be conclusively presumed to be old enough to have that knowledge of right and wrong which should subject him to the penalties of the law, is not the matter under consideration, but it is as to whether after that knowledge is found to exist, all offenders should be equally punished. And now it is insisted that the Code in the provision last referred to, by enacting that the prosecution should take the burthen of proof to show the existence of this knowledge in the case of persons under thirteen years of age, assumes as a fact that after that age the defendant may have this knowledge, as is demonstrated by the fact that after that age he is not allowed to show a want of such knowledge, unless he can establish his insanity. Then a sufficient knowledge of right and wrong being the true test of guilt, and the code assuming that it exists after thirteen years of age, how can the provision unequalizing the punishment of offences as to persons under and over sev-

enteen years of age, be justified? Surely it cannot be done upon any well founded principle. The one or the other of these enactments must be wrong. All that I assert is, that after the law conclusively assumes capacity to commit a crime, it should make no distinction between offenders, further than to allow the jury to pass upon the circumstances of aggravation or of mitigation, connected with the commission of the offence. The conclusion is that, in the case of two persons who have legal capacity to commit a crime, when they are indicted for the same offence, it is unequal and unjust to send one to the penitentiary, and the other to the House of Correction, penalties altogether different in hardship and degradation. Let the law have equal bearing on all subject to it, be equally administered, and then public justice will be certain

The whole subject of the Penitentiary would be passed over in silence, but for one subject which it suggests—that of solitary confinement for life, which, being presented in this connection, may as well be discussed here as elsewhere. It is this mode of punishment and not the place of inflicting it, that is objectionable. Then the question is, should the punishment of any offence be solitary confinement for life? The fair discussion of this, as of all other subjects, requires that certain general propositions or premises should be admitted. All will admit, that Legislative enactment, or a human law, can have no power over man's relation to God or eternity. In this respect, man is above all human law and entirely beyond its control. It cannot effect his future state or his condition there. It is impossible to legislate man into or out of heaven. These are matters resting altogether between him and his God. Another proposition to be admitted is, that it is right in some cases to inflict capital punishment as a penalty. As a question of existing law, this will not be denied, for the legislation of our government, from its foundation to the present time, the Code included, in some instances has affixed capital punishment to some offences. These propositions being admitted, and neither of them will be denied, the abstract right to inflict capital punishment in any case, is not the question involved in this

discussion: but the question is as to the cases in which it should be inflicted.

Now, on what basis shall the line of distinction be drawn between offences to decide which should be punished with death and which not? The only answer is, that when the offence is so heinous in its nature and circumstances, that the offender forfeits his rights among men, and ought to be withdrawn totally from all human society and perpetually incarcerated in solitary confinement, he should suffer death: for the grave is the only place of solitary confinement known to reason, nature, or the laws of God. Contemplate the condition of a man in solitary confinement, and discover, if you can, any beneficial result to be accomplished? Can he there achieve any good to himself? Will the sad knowledge of his secluded, degraded and solitary condition console him, or his anxious solicitude for his wife, children, or former friends, of whom he is not permitted to hear a word, better his condition, or the heavy bolt and grating hinges of his cell door as it opens to admit his keeper with bread and water as his aliment of life, be less than torture itself? In all these points of view, the heart sickens and recoils from the contemplation. It is the penalty of death inflicted by torture. It is a mere change of mode in producing the same result—a bitter and a severe change which should be abolished as a barbarism handed down to us from the days of the crusades. If a man by great crime renders himself so guilty that he should be excluded from the light of heaven and from the world, and the world from him, what interest has he in life? or what benefit is to be derived to others from his punishment? He, nor society will gain anything by his reformation, for he is confined in solitude for life. Henceforth, the world must remain to him a barren and cheerless desert waste. Lost to all hope, to all liberty, nothing remains for him but to suffer the penalty of death inflicted by the hand of lingering cruelty. Let humanity be heard, and his penalty be changed in all cases to that of death, where capital punishment is proper, and in all others suitably modified.

Article 214 provides that, "All persons are principals who are guilty of acting together in the commission of an offence." The scope and meaning of this enactment are ascertained and fixed by the subsequent special provisions on the same subject. It is a well settled rule of construction that the enumeration of particulars, under a general rule, excludes from its operation every thing not specified—that is, that the inclusion of one thing is the exclusion of another not mentioned. This rule of construction is not artificial or arbitrary, for it is founded in reason and common sense. The Code has announced this rule in these words: "In the construction of this Code, each general provision shall be controlled by a special provision on the same subject, if there be a conflict." It will be admitted, that a conflict may arise as well from a modification or enlargement of a general provision, as from a contradictory enactment. The result is, that to determine who sustains the relation of principals to a given offence, resort must be had to the special enactments on the subject.

The first special provision is substantially this. When an offence is actually committed by one person, and another is present, and knowing his unlawful intent, aids him by acts, or encourages him by words, or gestures; or, not being present, keeps watch so as to prevent his interruption, the one thus aiding, encouraging, or keeping watch, is a principal. It will be observed, that in all cases provided for in this enactment, the persons declared to be principals must have, at the time of their participation in the unlawful act, a knowledge of the illegal intention of the actual offender; and having this knowledge, of course by aiding, encouraging, or protecting him in the commission of the act, they show that they possess the same unlawful intent, and are moved by it. They are both actuated by the same wicked purpose, and act together in executing it. Identity of motive and union of action, put them on the same footing, and make them equally guilty, and they should be equally punished. This provision of the Code contains a principle of our former law which was well understood in its application as a rule of decision and nothing is gained

by its re-enactment except that it is to be found in one more book in the form and shape of an inflexible rule

The second provision is this: "All persons who shall engage in procuring aid, arms, or means of any kind, to assist in the commission of any offence, while others are executing the unlawful act, and all persons who endeavor, at the time of the commission of the offence, to secure the safety or concealment of the offenders, are principals, and may be convicted and punished as such." This enactment is surely unsupported by principle, or reason, and it cannot be justified by either. Under its operation, a man whose heart was never under the influence of malice or wicked impulse, may be convicted of murder, and made to suffer the penalty of death. The motive, intention and design which prompt the person who may furnish aid, arms, &c., to the principal offender, are excluded entirely, and are not permitted to be considered in deciding the question of guilt or innocence, or the degree of the offence. Every candid mind will admit that motive and design lie at the foundation of the question of guilt, in all cases of homicide, and that in such cases, they are indispensable elements of guilt. Shall it be said, that a man should be capitally punished for taking the life of another when he had no malice in his heart, or intention to do it? Is it true, that a man ought to suffer the penalty of death for handing a loaded pistol to another engaged in a fight, when such were the circumstances, that they ought to convince every observer, that the crime of wanton murder was about to be committed by taking the life of the person thus aided, admitting that he, by using the pistol, and thereby killing his victim, makes himself a cold blooded murderer? This may be illustrated. Suppose a young man in company with his companions, assails one of them without cause, beats him severely, and covers himself with his blood. While the contest is still pending, the father of the assailant arrives and the son, without giving the least time for consideration, appeals to him for aid, saying that his adversary is armed, has stabbed, and will kill him, if he is not furnished with the means of immediate defence, and others join in the

appeal, and assure the father of the truth of the son's statements. The father honestly believing these things to be true, procures and hands his son a pistol, and he kills his adversary. The son is evidently guilty of murder, and should suffer the penalty of death. But is the father a murderer, and ought he to suffer the same penalty? Surely not, for he acted under a state of circumstances that would have controlled the action of any man thus situated; his sole object being to enable his son to defend himself against an unprovoked and deadly attack; but according to the provision of the Code under consideration, the guilt of the son would attach to the act of the father; and he too, would be a principal, for he engaged in procuring, and did procure aid to assist in the commission of the act, and his reasons and motives have nothing to do with the question of his guilt. Let the candid reader remember that the Code requires each of its enactments to be construed according to the clear import of the language, in which it is written, and he cannot escape from the view taken, that those in the provision quoted, declared to be principals, are guilty of the offence committed by the actor, if they *merely engage* in procuring aid, or means of any kind, to assist him, regardless of their reasons and motives, although they be such as would, and under the existing circumstances, known to them, ought to impel the action of the most law abiding and upright citizen. It is not necessary, under this provision, to make a man guilty as a principal in a murder, that he should participate in the slightest degree, in the malice and designs of the murderer; it is enough if he should engage in procuring aid, whatever may have been his prompting motive.

The radical error in the provision is, that it makes the man who engages in procuring aid guilty as a principal, in the absence of a knowledge of the unlawful intent of the actor and of illegal intent in himself. This knowledge, or this personal malice, must exist before a man in morals or well founded law can be a principal murderer. No recognized rule of construction can be applied to relieve this provision of the error, for it is unambiguous and must be construed according to the plain

meaning of its language, and there is no other enactment in conflict with it so as to enlarge or modify it.

The third provision makes all persons principals who cause a person who cannot be punished to commit a crime, and also those who commit an injury upon the person or property of another by any indirect means, with intent that the injury should result.

The fourth provision provides that persons who advise or agree to the commission of an offence, and are present when it is committed, are principals whether they aid or not in the unlawful act.

The Code has made no distinction between principals as known to our former law. The degree of their guilt, as evinced by their connection with the illegal act, no longer divides them into principals in the first and second degree. This is a proper distinction, and it should exist. Men who concur in the same result, may be altogether differently circumstanced in respect to the transaction, and may be prompted by different motives and act different parts; and by their conduct they should be judged. But having gone far enough to be principals, they can only be thus judged by observing the distinction between principals in the first and second degree. This distinction is founded in justice, reason, and morality, and the law should recognize and enforce it.

The Code affixes to a vast number of felonies, alternative penalties—that is, it is left discretionary with the jury, to decide whether many felonies shall be punished by fine, imprisonment in the penitentiary, or county jail. One of the many examples of alternative penalties to be found in the Code, will be given. It is unnecessary to enumerate all, as one will illustrate the whole. In Article 254, it is enacted that, "If any officer named in the preceding Article, shall accept a bribe so offered, he shall be punished by confinement in the penitentiary not exceeding two years, or by fine not exceeding two thousand dollars." Article 76, provides that, "Whenever, by the provisions of this Code, the penalty for an offence, is confinement in the penitentiary, or fine as an alternative, it shall be

in the discretion of the jury to substitute imprisonment in the county jail, instead of the penitentiary. It is needless to say that the jury are authorized by this Article, to substitute imprisonment in the jail; instead of the penitentiary, in all cases when the penalty is fine or imprisonment in the penitentiary: and that in such cases, the jury, at their discretion, may impose either of three penalties, each being entirely different from the other in hardship and degradation.

Now, it is insisted that alternative penalties, especially in cases of felony, are unfounded in principle and justice, and that they cannot be justified by either. The vast power thus conferred on juries, is very objectionable. It is at war with the theory of our government, and the constitutional division of its powers. It transfers to the jury, legislative power, which can only be safely exercised by the legislature. It belongs to the law making department of the government to declare what shall be an offence, and affix to it the proper punishment. The rights and liberties of the people, protected as they are, by the constitution, can only be endangered by laws which may be unequally administered. A moment's reflection, will show to the candid mind, that a criminal law cannot be made uniform and equal in its bearing, without affixing to each offence a penalty certain and fixed in its nature—without classifying offences according to their moral quality, or the quantity of evil involved in their commission, and affixing to each of a particular class, a punishment commensurate with the magnitude of the crime. To illustrate: After deciding that bribery is an offence, which in one case, should be punished by imprisonment in the penitentiary, the whole question is settled, for bribery is bribery, wherever and by whomsoever it may be committed: and it should be punished as such, and the jury should have no power to punish the offence in one case, with one penalty, and in another with a penalty altogether different in its nature and character. It is the intrinsic qualities of an act, that should cause its commission to be made an offence and indicate its punishment; these qualities are as well known before, as after the act is committed; and therefore, it

is wholly unnecessary to delay until after an offence is committed, to decide what penalty should be inflicted on the offender; for all the knowledge essential to this exists prior to the offence. Then the argument founded on the supposed superior information of the jury, who hear the testimony, as to the punishment to be inflicted for a given crime, falls to the ground. The testimony only informs them that the crime has been committed, and of the circumstances under which it occurred. While it is urged that the jury should have nothing to do with the character of penalty to be inflicted, it is admitted that the circumstances of aggravation or of mitigation, surrounding its commission, ought to be considered by the jury to decide the extent of the penalty within the lowest and highest limits fixed by law, for justice requires it. To this end, the legislature should affix to each offence its proper punishment, restricting the jury within the lowest and highest extent of the penalty thus prescribed, and not give them the discretion to decide which of the three different penalties should be inflicted for a particular crime and also full discretion to determine the extent of the penalty, which they may select, provived they do not exceed the highest amount of punishment prescribed. The circumstances of the case, after it is ascertained as a fact, that a given crime has been committed, have nothing to do with the nature of the crime, or of the penalty. Their whole office is, to regulate the extent to which a penalty of a fixed nature and character shall be inflicted—to mitigate or aggravate the crime.

Laws which prescribe alternative penalties, are in principle if not in fact, *ex post facto*. To prevent a law from being *ex post facto*, it must not only be enacted before the commission of an act prohibited by it, to subject the actor to punishment, but it must also prescribe the penalty to be inflicted. It is undoubtedly true that the penalty of an act must be prescribed before the act is done, or it cannot be inflicted. The citizen must be informed what he is to suffer, if he violates the law, or he cannot be punished. Is a person who commits the offence, mentioned in Art. 254, informed by it, what penalty

is affixed to it? He may be sent to the penitentiary for one day, or any other length of time not exceeding two years, or he may be imprisoned in the county jail one minute, or for any period of time not exceeding two years; or he may be fined one cent, or any other sum not exceeding two thousand dollars. Is this in any just or constitutional sense, prescribing the penalty of an offence? Penalties as different as day and night may be inflicted, and no man can forsee how, or in what manner, the offence will be punished. In principle, does not this uncertainty involve much that is objectionable, in an *ex post facto* law? And does it not participate largely, the nature and character of such a law.

Alternative penalties are objectionable, also, for a very practical reason, which must have fallen under the observation of every lawyer, and every citizen who has paid much attention to the results of trials in criminal causes. They must have been impressed with the impossibility of securing an equal administration of the criminal law, in cases where the law gave the jury no discretion as to the penalty to be inflicted; such being true, in cases where the jury have no discretion, how much the more will it be true in cases where they may not only choose between three penalties, but also determine its extent. It is not necessary to inquire into the cause of this inequality, but knowing that it exists, it should be removed as far as possible. The fact cannot be disguised, that the powerful and influential have generally escaped punishment, even in the face of absolute law, regardless of their guilt or the magnitude of their offence. But how much more easily can it be done in cases where a jury may assess a fine of one cent, that should be punished by confinement in the penitentiary for years. While on the other hand, the weak and uninfluential seldom pass unpunished by the severest penalties of the law, except by making their escape before arrest, or breaking jail and thus avoiding a trial. I speak of facts as we know them to exist, and as belong to public justice. Every effort should be made to render the law certain, uniform, and equal in its bearing and administration, which no reflecting man will

say can be accomplished, without making the law itself certain, fixed, and uniform. This being done, the balance of the great work must depend on the integrity of juries. It is not strange that, when the law fails to protect us, and to operate equally on the powerful and the weak, that we should take our protection in our own hands, and that the weak should, by evading the law and by force, when evasion is impossible, put themselves as to the law, on the footing of those who, from power and position, escape its penalties. This is not imagination. It is stubborn truth. The law should not be so framed as to multiply or augment these evils. It may be depended on that, fixed and certain penalties, and a uniform and equal administration of the law can command the respect of the people for it, and secure its triumph as a rule of action.

Passing over many matters of detail, belived to be objectionable, the subject of Raffles is next in order. ARTICLE 403 provides that, "If any person shall establish a raffle, for, or dispose by raffle, of any estate, real or personal, exceeding five hundred dollars in value, he shall be fined not less than one hundred, nor more than one thousand dollars." There are many objections to this enactment, believed to be well founded. Disposing of property by raffle, is a species of gambling, as bad in morals as card-playing, and would be as pernicious in its influence, if it were as popular and as general a mode of gaming. It should be absolutely prohibited, because it possesses an inherent evil; it is wrong in itself, and therefore, the amount involved, has nothing to do with the question. Not making it penal, thus to dispose of an estate under the value of five hundred dollars, is equivalent to saying that it is right to dispose in this way, of property, under this value; for what is not interdicted is by implication, sanctioned and encouraged. It must be admitted, that if a particular mode of disposing of six hundred dollars worth of property is wrong, it would be equally wrong to dispose in the same manner of property of the value of five hundred dollars. This subject is too plain to demand elucidation. But again, the provision is wrong because it can be easily evaded, and will not prevent the evil

A man worth a million of dollars may purchase property; each article of which may be necessary to the daily use of the people, and of a marketable nature, but under the value of five hundred dollars, and by disposing of it, article at a time, by raffle, will commit no offence, although it may be the occupation of his life. Suppose a man had a thousand horses and were to raffle them all off at once, this would be an offence; but if he should dispose of them one at a time, it would be no offence. It must be evident to all, that a law so susceptible of evasion, can do little or no good.

Card playing for money, or anything of value, is made an offence by the Code, *on account of the place where* it may be done. The Code enumerates certain specified places, and prohibits gaming in those places, and no where else. In other words persons may assemble at any place not mentioned in the Code, and exhaust their passion and estate in gaming, and the law will not be violated. They will have committed no offence in the eyes of the law, even if thereby their wives and children should be reduced to beggary and disgrace, which, all know to be the ordinary, and most general result of that vice, to say nothing of the demoralizing and damning influence of the practice, upon him who indulges in it. These may be regarded as harsh and strong terms to use in respect to this practice. They are applied to the evil, and not those who indulge in it. There is, here and there, a man who can addict himself to gaming, and be honest to his adversary in the game, and spurn to take any advantage, not recognized by fairness and integrity. There is, here and there, an oak of giant power, that has stood unharmed amidst the storms of heaven; but look at the vast desolation and ruin all around it, produced by the hurricane, which it has withstood. That oak standing alone in the midst of surrounding ruin, is but a monument of the desolating power of the hurricane. So the man of uncompromising honesty and integrity, accustomed to gaming, who escapes its pernicious influence, is but a monument of the overwhelming, prostituting, and degrading power of the practice. The truth is, that gaming possesses inherently, a dangerous evil—

a dangerous vice, that does not depend for its existence, upon time or place. Let the game be played, if you please, upon the mountain's top, or in the valley's deep, where no human eye can see, and no human ear can hear, and the evil—the vice will be there, with all its power; and the parties will disperse, having done each other as much injury, and with their passion for gaming as much increased as if they had played in a place prohibited by the Code. The Code should have prohibited gaming, without regard to time or place.

The crime of murder is thus defined by the Code. "Murder is voluntary homicide, committed with deliberate design, by whatever means perpetrated, when the offence does not come within the definition of any of the homicides which are enumerated in the preceding Chapters of this Title." The chapters referred to in this definition, specify the circumstances, under which homicide is no offence, or an offence less than that of murder, as shown by Art. 608. "Murder, is distinguishable from every other species of homicide, by the absence of the circumstances, which reduce the offence to negligent homicide, or manslaughter, or which excuse or justify the homicide." This definition is equivalent to saying that, if homicide is nothing else, it is murder, and the description of the offence thus given, is no more certain than would be the description of a particular substance, if it should be said, that if it has no other color, and it is not perfectly transparent, it is black. In the one instance, what idea of murder do you derive from the definition, and in the other, what information of color do you gain from the description? It is apparent that the inquirer cannot be informed as to what murder is, until he knows the whole law on the subject of homicide, and that all of the law that belongs to that subject, is involved in its definition. The definition of murder given in the Code, requires the consideration of, so much extraneous matter, and is so general and uncertain in its terms, that the citizen never can understand it, and that lawyers and judges cannot agree about it, until the Supreme Court shall have fixed its meaning and given form and outline to it by a sufficient

number of decisions to expound the whole subject, and combine all of the elements, or ingredients necessary to constitute the offence. The definition of murder is but the enumeration of the ingredients of the offence. This has already been done by a long succession of ages, with such brevity and clearness, that none could fail to understand it. It has entered into our common dictionaries, and the school boy knew what murder was. But where is the lawyer or judge, who can take the Code as his guide, and tell with certainty, what murder is? After the Supreme Court shall have framed a definition of murder, we shall know and agree what it is, but not until then.

The provisions of the Code, regulating the trial and punishment of those indicted for murder, if possible, are more objectionable than those defining the offence. ART. 609 provides that, "The jury, in every case of murder, will regulate the punishment according to a just estimate of the heinousness of the offence." Now, it is true, that murder, in one instance, may show a greater degree of depravity and cruel malice, than another, but the only safe and sure way to draw the distinction between them as to the penalty to be inflicted, is, by the law, dividing the crime into murder in the first and second degree, and affixing to each a certain and well defined penalty. Murder is always murder, and can never be anything else, and differing only with reference to the circumstances of its commission, it is not susceptible of division into but two classes, each of which is so susceptible of a fixed, and certain definition, that the degree of guilt involved, and the penalty, ought to be regulated by law, and not left to the jury. For in the law, there can be justice and certainty, but in the opinions of men, regardless of the circumstances under which they may be brought together, and the subject upon which they are to act, there will be differences, unless their deliberation should be governed by prescribed rules. The jury are authorized to consider the condition of the person murdered. *What does the condition of the person murdered,* as used in this connection, mean? This is a proper question, for the provision is to be construed according to the plain import of the language

employed, and so as to give it effective operation as a law. This is a sound rule of construction, and it requires each enactment on the same subject, to be construed with reference to every other, when such reference is necessary to give them all effect. The other provisions, specifying what the jury may consider in cases of murder, are these: "The means used to effect the killing, and the degree of cruelty displayed by the person guilty thereof." This allows the jury to judge the case, from all the lights thrown upon it by the nature, character, and kind of agency employed to produce death, and the manner and circumstances of its use. "The purpose for which the homicide is committed." This authorizes the jury to consider all that belongs to the motive, design, and intention which prompted the act. "The relationship between the offender and the person killed." This permits the jury to look to the connection, existing between the parties, to the transaction, if any subsisted. The time and place, and the circumstances attending the commission of the offence, and any and every circumstance tending to show the degree of moral turpitude attached to the offence, and the influence of its perpetration upon society, by reason of the peculiar characteristics attending the case. This provision is so comprehensive and general that, under it, the jury may inquire into every thing connected with the time and place, all the circumstances surrounding the transaction, and its influence upon society.

Now, in view of these provisions, the question is again asked, what is the scope and meaning of the enactment under discussion? "The condition of the person murdered." It must mean his personal condition including his rank, or position in society, and fortune. It will admit of no other construction. It is the plain import of the language used. Every circumstance, besides the personal condition of the party killed, that can have any bearing upon, or connection with a case of murder, is authorized to be considered by the other enactments quoted, and if this is to be so construed as to give it a meaning different to that of all others upon the same sub-

juct, and make it effective, the construction is inevitable. It must relate to the external condition of the man, for all things besides this are elsewhere provided for, and a man's external condition means his situation in life. In other words, it is his rank and position in society, and the degree of his fortune—his situation in respect to these things. And according to the Code, these extraneous matters are to be considered in the punishment of a murderer, but the effect to be given to them, the Code does not inform the citizen or the jury. Suppose two men who are equally moral and upright as citizens, but in widely different conditions, should be murdered under the same circumstances, shall the jury convict the defendant who killed the man in a good condition, to be hanged, and the defendant who killed the man in a bad condition, to be sent to the penitentiary for three years, or shall the jury reverse the penalties? It is at their discretion. They are left without guide, or restraint to give what effect they see proper to the condition of the person killed, or the punishment of the offender. The crime of murder may be punished by either of three penalties—death, solitary confinement in the penitentiary for life, or confinement in the penitentiary to labor for a term of years, not less than three nor more than fifteen.

Such are the provisions of the Code, defining murder, regulating the province of the jury in trials on indictments for the offence, and affixing its punishments. It must be apparent to all, that weakness and uncertainty pervade the whole law on the subject. There is no power or inflexible certainty in it. It may be bent and twisted at the pleasure of those who do not wish to see it enforced. In regions where the people are determined that law shall be administered, murder may be properly punished. But in sections where they are indifferent about it, or opposed to it, the vilest murderer may be sent to the penitentiary for three years. It is strange that juries should be left without legal restraint to such latitude, in cases of so much magnitude. One man may be hanged, and another, equally guilty, sent to the penitentiary for three years.

The law on the subject of murder can and ought to be certain. It is capable of the greatest certainty.

The various offences heretofore known as swindling, are not prohibited and made penal by the Code.

The better opinion is, that the statute known as the Road Law is repealed by the Code, and if so, the State is without a law on that subject.

C. A. FRAZER,
Judge 6th Judicial District.

Marshall, Texas, Aug. 22, 1857.